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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR CLINTON GIVENS, Defendant and Appellant.	C060240 (Super. Ct. No. 07F03368)

Defendant Arthur Clinton Givens,[1] who pled no contest to possessing cocaine base (Health & Saf. Code, § 11350, subd. (a)), appeals from an order regarding sentencing. He contends the trial court abused its discretion in (1) terminating his participation in a Proposition 36 drug treatment program (Pen. Code, § 1210 et seq.[2]), (2) denying him the alternative of drug court, and (3) "imposing" (lifting the suspension on a previously imposed) jail term because of his failure to pay

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[1] Appellate counsel's briefs refer to defendant as "Givins." However, the trial court records and the notice of appeal filed by defendant in propria persona show his name is Givens.

[2] Undesignated statutory references are to the Penal Code.

restitution in an unrelated case without ascertaining his ability to pay. We shall affirm.

BACKGROUND

On March 26, 2007, the prosecution charged defendant with one count of possessing cocaine base on January 30, 2007, in violation of Health and Safety Code section 11350, subdivision (a).

On April 16, 2007, pursuant to a plea bargain, defendant pled no contest and was found guilty of possessing cocaine base (between .3 and .75 grams).

On May 7, 2007, the trial court suspended imposition of judgment and sentence and placed defendant on five years formal probation subject to conditions including the condition that "defendant shall serve 365 days in the Sacramento County Jail. . . . Execution of said term is suspended pending completion of Proposition 36 program." The trial court also reinstated probation on two prior unrelated cases.

Probation Department progress reports indicate defendant initially had good attendance in treatment and a positive attitude, but he failed multiple drug tests, failed to show for some scheduled drug tests, and in October 2007 missed four treatment sessions. A progress report on October 26, 2007, recommended that defendant receive a first drug violation of probation "based upon his positive tests, missed test and missed treatment sessions."

A progress report dated January 4, 2008, said defendant failed to appear in court on October 26, 2007, and was arrested on a no-bail warrant in December 2007. He was also arrested in July 2007 for possession of burglar tools and driving without a license.

On January 4, 2008, defendant appeared in court, admitted the first drug violation of probation, and was ordered to follow through with the drug program and return to court on February 8, 2008.[3]

On February 8, 2008, the prosecution asserted a "second drug violation" and sought "deletion as a refusal," because defendant failed to report for reauthorization, as ordered by the court at the January 4 hearing, and had not been in treatment since his October discharge. The probation department's progress report for the February 8 hearing said defendant failed to take a drug test on January 22, 2008, failed to report to the treatment program as directed by the court at

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[3] On appeal, defendant asserts the violation was based on a December 2007 arrest for new offenses (§ 666 [petty theft] and Veh. Code, § 14601.1 [driving while privileges suspended for other offenses]) as well as drug-related violations -- "dirty" drug tests and failures to appear for tests, drug treatment, and court hearings. The progress reports indicate the December 2007 arrest was for failure to appear in court, and defendant was arrested in July 2007 for violations of section 466 (possession of burglar tools) and Vehicle Code section 14601.1. What matters for purposes of this appeal is that there were drug-related violations of probation.

the January hearing, and had not been seen in treatment since his discharge on October 11, 2007.

At the hearing on the second violation, defendant asked to address the court and said he was in a jury trial on an unrelated case (in which he was ultimately acquitted) "from January until into February, and they was telling me to go -- I went and seen the probation department, they told me to go down to the Effort [treatment program]. I went to the Effort, the Effort sent me back to the probation department. They won't put me in --[.]" The court asked where defendant had been since he left treatment in October 2007. Defendant said he had been in jail. The probation officer stated defendant was in jail between December 11, 2007, and January 4, 2008. The court said, "We are narrowing it down" and asked where defendant was from October through Thanksgiving. Defendant said, "I missed court." An assistant public defender said, "I believe he's drug court eligible." The trial court responded, "Let's try that program. I've had people not make it here, but could make it through drug court." The court then immediately elicited a waiver of defendant's right to remain silent, and defendant admitted the probation violation. The trial court said, "I find you to be unamenable. I'm taking you out of this program, but be here for drug court on February 25th at 2:30." A handwritten notation in the court minutes for February 8 said, "pend DC."

On February 25, 2008, defendant appeared but his attorney did not. The court made no mention of drug court but asked

defendant if there were "[a]ny possibility of paying . . . off" $2,252.56 he owed since 2004 or 2005 on an unrelated case (04F02353). Defendant said, "It would take a while," about four months. The court rescheduled for July 21 and told defendant, "You have to stay out of trouble. If you get in trouble, you're immediately out of the program." It is not clear what program. The court also said, "I'll be honest with you, there's a possibility you can't pay. Just own up to it. We'll deal with it. I'm going to give you a chance to make it."

On July 21, 2008, defendant appeared with counsel. No one mentioned drug court. The trial court simply said defendant still owed $2,252, and asked, "Any prayer of paying that off?" Defendant said yes and blamed the delay on difficulty getting back from the police $5,000 that belonged to him. Defendant was taken into custody on unrelated cases, and the court warned him that the next hearing date, September 22, was "the end of the road."

On September 22, 2008, the court noted no payments had been made. Defense counsel said, "I don't think there's a realistic possibility that he can pay[]off the victim restitution," but defendant had been accepted to the Salvation Army residential program, and counsel urged the court to sentence him to this six-month program in lieu of custody time. The court denied the request and imposed the prior sentence of 365 days in county jail. The court minutes stated in part, "Deny/Delete Drug Court."

On October 20, 2008, defendant filed a notice of appeal.[4]

DISCUSSION

I. Termination of Proposition 36 Treatment

In this appeal from the trial court's September 2008 order, defendant challenges the trial court's February 8, 2008, order terminating him from the Proposition 36 program (§ 1210-1210.1). Proposition 36 replaces incarceration with community-based substance abuse treatment programs and probation for persons convicted of specified offenses of nonviolent drug possession. (*People v. Hazel* (2007) 157 Cal.App.4th 567, 572.) Defendant contends the trial court abused its discretion by terminating his participation in the Proposition 36 drug program, because his second violation was based on conduct predating notice of the first violation, and thus he did not get two chances to reform his conduct, as required by statute.[5] As defendant sees

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[4] The October 2008 form notice of appeal, filed in propria persona, indicates defendant appeals from an order entered on September 22, 2008, but that handwritten date is crossed out, and "5/7/07" is written above it. An appeal from the May 7, 2007, order would be untimely. (Cal. Rules of Court, rule 8.308(a) [appeal must be filed within 60 days of the order]; undesignated rule references are to the California Rules of Court.) We shall liberally construe the notice of appeal (Rule 8.304(a)(4)) as being from the order entered on September 22, 2008. This construction is supported by the statement in defendant's request for a certificate of probable cause (which was denied), complaining that he was "kicked out of the drug treatment program only because I was too poor to pay" restitution.

[5] Anticipating that drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at

it, he was not afforded his mandatory second chance at Proposition 36 treatment because on February 8, 2008, when the court found the second violation, it used some or all of the same factors it had used to find the first violation on January 4, 2008, namely his failings from October through Thanksgiving of 2007. Defendant claims the second violation cannot be based on his failings after January 4 (failure to report for reauthorization as ordered on January 4 and failure to report for a drug test on January 22), because he explained he was in trial on another case and had tried to report but had been bounced from one agency to another. He says the trial court made no attempt to verify his claims.

Defendant also suggests he was induced to admit the second violation on February 8, 2008, by a promise of drug court.

However, even assuming for the sake of argument that defendant could appeal his termination from Proposition 36 after

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probation before permitting a court to impose jail time. (*Hazle, supra*, 157 Cal.App.4th at p. 572.) The first time an offender violates a *drug-related* condition of probation, he is entitled to be returned to probation unless he poses a danger to others. (*Id.* at pp. 572-573.) The second time he violates a drug-related condition of probation, he is entitled to be returned to probation unless the trial court finds by a preponderance of evidence that he either poses a danger or is "unamenable to drug treatment." (*Id.* at p. 573; § 1210.1, subd. (f)(3)(B).) If a third violation is found, the offender loses the benefit of Proposition 36's directive for treatment instead of incarceration. (§ 1210.1, subd. (f)(3)(C).) Upon a defendant's termination from Proposition 36, the trial court regains its discretion to impose jail or prison time. (*Hazle, supra*, 157 Cal.App.4th at p. 573, 575-577 [notice of first probation violation must be given to the defendant before the conduct underlying a second probation violation occurs].)

admitting the second probation violation and without obtaining a certificate of probable cause (§ 1237.5), defendant's attacks on the trial court's February 8, 2008, order finding him unamenable and removing him from the Proposition 36 program would be forfeited by defendant's failure to file a timely appeal from the February 8, 2008, order. (§ 1237 [appeal may be taken from order made after judgment, affecting party's substantial rights]; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421 [appealable order that is not appealed generally becomes final and may not subsequently be attacked on appeal from a later appealable order].) The current notice of appeal, filed October 20, 2008, was too late to attack the February 2008 order or admissions leading to that order. (Rule 8.308(a) [60-day time to appeal].)

Defendant fails to show grounds for reversal regarding Proposition 36.

II. Drug Court

Defendant contends he was statutorily entitled to the alternative of "drug court" or the Salvation Army program after he failed the Proposition 36 program.

However, the cited statute (§ 1210.1, subd. (d)(1)[6]) merely states a court may modify probation terms to ensure that a

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[6] Section 1210.1, subdivision (d)(1), states, "If at any point during the course of drug treatment the treatment provider notifies the probation department and the court that the defendant is unamenable to the drug treatment being provided, but may be amenable to other drug treatments or related

defendant receives an alternative drug program *if the treatment provider* states the defendant is unamenable to its treatment but may be amenable to other programs. That did not happen in this case. The alternative of drug court was mentioned by an assistant public defender, not by the Proposition 36 treatment provider.

Defendant also quotes from section 1210.1, subdivision (d)(2), that the court may revoke probation only if "it is proved that the defendant is unamenable to *all* drug treatment programs." (Italics added.)

However, the trial court did not revoke probation; it merely lifted the suspension on the jail term that had been imposed as a probation condition. Thus, on May 7, 2007, the trial court suspended imposition of judgment and sentence and placed defendant on five years formal probation subject to conditions including the condition that "defendant shall serve 365 days in the Sacramento County Jail. . . . Execution of said term is suspended pending completion of Proposition 36 program." Although the court minutes for defendant's appearances on January 4, February 8, and September 22 of 2008, include references to "PROB REV & REIN OTC," the reporter's transcript for those dates fails to show the court ever revoked defendant's probation. The reporter's transcript for September 22, 2008,

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programs, the probation department may move the court to modify the terms of probation, or on its own motion, the court may modify the terms of probation after a hearing to ensure that the defendant receives the alternative drug treatment or program."

shows the trial court said, "You're still on formal probation." Whether the clerk's transcript or the reporter's transcript controls when the two are in conflict depends on the circumstances of each case. (*People v. Smith* (1983) 33 Cal.3d 596, 599.) Here, we conclude the reporter's transcript is more reliable than the cryptic notations in the court minutes.

Moreover, defendant fails to support his apparent assumption that the trial court's willingness to try drug court meant defendant was still amenable to Proposition 36 treatment (so as to maintain the suspension of the jail term). Proposition 36 and drug court are two different things. (§ 1210.1 [Proposition 36], § 1000 [diversion program]; Health & Saf. Code, § 11970.1, 11999.30 [drug court].) Section 1210.1, subdivision (f)(3)(C), states that upon a third Proposition 36 violation, if the trial court determines defendant is not a danger and would benefit from further treatment, the court may alter the treatment plan under subdivision (a) [of Prop. 36] "*or transfer the defendant to a highly structured drug court*. If the court continues the defendant in treatment under subdivision (a), or drug court, the court may impose appropriate sanctions including jail sanctions as the court deems appropriate." (Italics added.) Proposition 36 did not repeal other programs, e.g., the deferred entry of judgment program for diversion under section 1000 et seq. (*People v. Sharp* (2003) 112 Cal.App.4th 1336, 1341; see also, *People v. Ochoa* (2009) 175 Cal.App.4th 859, 861-862 [more-than-two-year-old prior conviction for

marijuana possession did not make defendant ineligible for diversion program].)

Defendant offers no analysis or authority entitling him to drug court.

III. Jail Term was not Imposed for Unpaid Restitution

Defendant argues the trial court abused its discretion in (1) imposing a jail sentence in this narcotics case due to an unpaid restitution fine from an unrelated case that was never consolidated with this case, and (2) failing to ascertain defendant's ability to pay the restitution. We see no basis for reversal.

Defendant claims the trial court revoked his probation in this case for nonpayment of restitution ordered in the unrelated case. However, the trial court did not revoke his probation and did not consider payment of restitution in the unrelated case to be a condition of probation in this case. Rather, the jail term was a condition of probation for this drug case -- a condition that had been temporarily suspended pending Proposition 36 drug treatment. Defendant agreed pursuant to his negotiated plea, that he would serve 365 days in jail as part of his probation if he failed the Proposition 36 program. The suspension was lifted when defendant failed the Proposition 36 program. The trial court could have sent defendant to jail at that point, but held off and granted defendant's requests for continuances for him to pay the restitution in the unrelated case. Even if he had paid the restitution in the unrelated case, that would not have

erased the jail term that was part of the negotiated plea in this case. It appears the trial court may have intended to continue the suspension of the jail term and refer defendant to drug court upon his payment of the restitution from the unrelated case. Defendant cites no authority entitling him to drug court or precluding the trial court from placing a condition on the referral to drug court.

Defendant also cites no authority requiring the trial court to determine ability to pay restitution ordered in an unrelated case before using the failure to pay as a reason to abandon a plan to refer defendant to drug court in another case. He cites section 1203.2, subdivision (a), that probation shall not be revoked for failure to pay restitution unless the court determines the defendant has the ability to pay and willfully failed to pay. Defendant cites inapposite case law holding that imprisonment of an indigent defendant for default in payment of a fine constituted an invidious discrimination on the basis of wealth. (E.g., *In re Antazo* (1970) 3 Cal.3d 100.) However, we have explained that probation was not revoked, and he was sent to jail for failing Proposition 36, not for nonpayment of the unrelated restitution.

Moreover, defendant ignores the fact that he twice told the court he *was* able to pay but just needed time. The court warned him that the third hearing date would be "the end of the road."

Defendant fails to show grounds for reversal based on drug court or the unrelated restitution.

Since we find no error, we need not address defendant's claim that cumulative error requires reversal.

DISPOSITION

The September 22, 2008, court order is affirmed.

SIMS, J.

We concur:

SCOTLAND, P. J.

CANTIL-SAKAUYE, J.